UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

RAHEIM ABDULLAH TRICE,

Defendant.
_____/

CASE NO. 1:18-CR-192

HON. ROBERT J. JONKER

OPINION AND ORDER

A. INTRODUCTION

Police searched Defendant Trice's apartment based on a search warrant and found distribution quantities of multiple drugs. Defendant Trice admits that the affidavit supporting the warrant was sufficient, as written, to establish probable cause for the search. However, he claims that two paragraphs used to provide a nexus to his apartment should be disregarded because they were based on constitutionally improper surveillance, including a hidden camera police used for several hours inside the common hallway of the lower level apartment that Defendant occupied. The Court conducted an evidentiary hearing and finds no basis for suppression.

B. FACTUAL BACKGROUND

Based on Investigator Marcel Behnen's affidavit, a Magistrate Judge on July 24, 2018 issued a warrant authorizing a search of Apartment B5 in an apartment building at 114 Espanola Avenue in Parchment, Michigan. (ECF No. 16-1, PageID.45-52.)[1] In the affidavit, Investigator

[1] The copy of the affidavit appears at ECF No. 16-1 with the street and apartment numbers redacted. Without objection from the defendant, the government provided the Court with an unredacted copy during the evidentiary hearing.

Behnen states that his current duties include, without limitation, "investigating violations of City Ordinances and State Statutes including controlled substance violations." (*Id.*, PageID.47.) He avers that he has been a public safety officer for ten years and that during that time "has been the primary investigating officer on over 390 investigations involving controlled substances." (*Id.*) He also describes training he has received in the investigation of controlled substance activities and in interrogation and interview tactics. (*Id.*) Investigator Behnen states that his experience and training have made him "knowledgeable in activities surrounding the packaging, sale and trafficking of controlled substances." (*Id.*)

1. Linking Drug Activity to Defendant

According to the affidavit, a confidential informant advised Investigator Behnen in the spring of 2018 that the CI could purchase heroin from a person known as "Radio." (*Id.*) The KDPS I/LEADS records database linked the alias "Radio" to Raheim Abdullah Trice. (*Id.*) When shown a photograph of Mr. Trice, the CI identified him as "Radio." (*Id.*)

Investigator Behnen attests that on July 19, 2018, KVET investigators used the CI to conduct a controlled buy of heroin from Mr. Trice. (*Id.*)[2] The CI was strip-searched, and the CI's vehicle was also searched. (*Id.*) No contraband or U.S. currency was found. (*Id.*) Investigator Behnen gave the CI "official KVET funds to purchase the heroin." (*Id.*, PageID.48.) KVET investigators surveilled the CI as the CI went to the predetermined meet location. (*Id.*) Investigator Patterson observed Mr. Trice walk down the driveway of 114 Espanola Avenue towards the predetermined meet location. (*Id.*) Mr. Trice and the CI made contact, and Mr. Trice returned to 114 Espanola Avenue. (*Id.*) The CI "was surveilled back to your affiant where he/she produced

[2] The affidavit notes that the CI had previously conducted seven successful controlled-buy operations under KVET's control, and that "[i]nformation this confidential informant has provided has been found to be credible and reliable." (*Id.*, PageID.50.) In this investigation, the CI "was cooperating with KVET for financial gain." (*Id.*)

a quantity of heroin." (*Id.*) Investigator Benhen field-tested the heroin, which tested positive for the presence of heroin. (*Id.*) The CI was again strip-searched. (*Id.*) Neither the CI nor the CI's vehicle contained contraband or U.S. currency. (*Id.*)

A second controlled buy of heroin from Mr. Trice took place within 24 hours before Investigator Behnen submitted the affidavit. (*Id.*, PageID.49.) The second controlled buy used the same protocol as the first. (*Id.*) A strip search of the CI and the CI's vehicle revealed no contraband or U.S. currency. (*Id.*) Investigator Behnen provided official KVET funds to the CI to purchase the heroin. (*Id.*) KVET investigators surveilled the CI to the predetermined meet location. (*Id.*) Sgt. Ferguson observed Mr. Trice "exit the rear first floor/basement door of 114 Espanola Avenue and walk down the driveway." (*Id.*) Mr. Trice made contact with the CI, and then returned to 114 Espanola Avenue and went back into the rear first floor/basement door of the apartment building. (*Id.*) The CI was again surveilled back to Investigator Behnen, and the CI produced a quantity of heroin that field-tested positive for the presence of heroin. (*Id.*) A second strip search confirmed that neither the CI nor the CI's vehicle contained contraband or U.S. currency.

The affidavit notes that Mr. Trice has at least five prior controlled substance related convictions. (ECF No. 50). The affidavit details the kinds of evidence drug traffickers commonly have in their residences or other locations to which they have ready access. (*Id.*, PageID.50-52.) The affidavit concludes that "there is probable cause to believe that narcotics can be found at [114 Espanola, Apt. B5], and that the occupant there is partaking in ongoing violations of the controlled substance act." (*Id.*)

2. Linking the Drug Activity to Apartment B5

The affidavit attempted to provide probable cause to associate this drug activity with Apartment B5 in several ways. First, as already recited, each controlled buy involved Defendant leaving from and returning to the apartment building at 114 Espanola. Second, again as already recited, on the second controlled buy, Defendant not only returned to the building, but also returned to the rear door of the apartment building, which provided direct access to the basement, or lower level, of the apartment building. Third, on July 10, 2018, investigators "surveilled Rhaeem Trice as the passenger in a 2004 Pontiac Grand Prix, bearing Michigan registration [redacted]." (*Id.*) The Michigan Secretary of State's records returned the license plate number to Cradonda Dominique Trice with an address of 114 Espanola Ave., Apartment B5 in Parchment, Michigan. (*Id.*)[3] And fourth, Investigator Behnen located a June 17, 2017 Kalamazoo Township Police report of officers responding to a complaint at 114 Espanola called in by Cradonda McFerrin (an alias for Cradonda Trice). (*Id.*) In that report, he found a reference to contact with McFerrin's neighbor at Apt. 6, which the report described as directly across the hall from McFerrin's apartment. (*Id.*)

Defendant does not challenge the constitutional validity of any of this information, but says it is inadequate to establish probable cause to provide a nexus to his particular apartment, B5 on the lower level of 114 Espanola. Defendant says the following two paragraphs are also essential:

> E. That your affiant entered 114 Espanola Ave to locate Apt. B5. Your affiant located six mailboxes inside the common entryway. Furthermore, your affiant located Apt. 1 and 2 on the third floor, Apt. 3 and 4 on the second floor, and apartment 6 on the first/basement floor. There was an additional door across from Apt 6 which did not have a number on it.
> ….
> G.(i) That KVET investigators conducted surveillance of 114 Espanola Apt B5 on this day and observed Trice entering and exiting Apt B5 on several occasions.

[3] Both sides refer to the apartment as Mr. Trice's residence, and neither side questions his standing to challenge the search.

And according to Defendant, these paragraphs depend on information gleaned during an unconstitutional entry and search by police into the common hallway of 114 Espanola. The government contends the information was properly obtained, but not necessary to establish nexus.

3. The Evidentiary Hearing

The affidavit itself recites that Investigator Behnen entered 114 Espanola to see if he could locate Apartment B5. He found six mailboxes in a common entryway, and apartments on three floors. At the evidentiary hearing, Investigator Behnen elaborated that he entered through the front door; found two apartments each on the upper, ground, and lower levels; and found apartment B5 on the lower level across from Apartment 6, consistent with the police report described elsewhere in the affidavit.

The affidavit also adds that "KVET investigators conducted surveillance of 114 Espanola Apt. B5 on this day and observed Trice entering and exiting Apt. B5 on several occasions." (*Id.*) During the evidentiary hearing, the Court learned that this surveillance occurred by means of a hidden camera in the common hallway across from the apartment door. (*Id.*) In fact, investigator Behnen placed the camera in a smoke detector positioned to capture video of the doorway of apartment 5B.

The building manager, Joseph Lukeman, testified that the main entrance of the apartment building has no lock or other barriers to entry. A photograph of the front door confirms this. There is no barrier to entry from the back door either, which leads most directly to the lower level. There is no lock, doorbell, or intercom. Mr. Lukeman testified that the building is freely accessible through the front door. Once inside the building, it is possible to access every floor of the building, including the basement level, through common stairs and hallways. Anyone could freely access the common hallways. This particular building did not post "No Trespassing" signs. Management

relied on tenants to report any unwanted people loitering in the hallways. There has been no testimony about that ever happening at 114 Espanola.

Investigator Behnen testified that in the course of the investigation he went to the building and found the main entrance door unlocked and ajar. He entered the building and walked the hallways of each floor, locating six apartments, including two on the basement level. He visited the building at a later point, again entering through the unlocked main entry, and placed a camera disguised as a smoke detector across the common hallway from the door of Mr. Trice's apartment. Investigator Behnen positioned the camera in a way that would allow it to capture images of people coming and going through the door of the apartment.

Investigator Behnen testified that he left the camera in place for approximately five or six hours. The camera was not recording all the time. Instead, it had a motion detector and recorded only when it sensed movement around the apartment door. Video clips introduced as evidence during the hearing showed Mr. Trice entering and exiting the apartment multiple times over the course of several hours. The few, brief video clips played at the hearing were the entire collection of video footage captured – a total of less than five minutes. The Court saw nothing intelligible on the clips other than Defendant Trice entering and exiting the apartment on multiple occasions.[4]

4. The Search and Motion to Suppress

Officers executed the search warrant on July 25, 2018. (ECF No. 19, PageID.61.) The search yielded "approximately 64 grams of crystal methamphetamine, 43 grams of crack cocaine, 28 grams of powder cocaine, three grams of heroin, digital scales, and packaging material." (*Id.*) Mr. Trice moves to suppress this evidence as the fruit of an invalid search warrant. He contends that the surveillance within the apartment building, particularly the placement and use of the

[4] On one clip, he paused a short time in the common hallway to do something with his cell phone. From the video, it was not possible to tell exactly what he did, or to read anything on his screen.

hidden surveillance camera, amount to an unconstitutional search. He argues further that absent the information the hidden camera provided -- his coming and going from Apartment B5 -- the affidavit fails to establish a nexus between his alleged criminal activity and Apartment B5, and the search warrant is invalid. The government contends that the surveillance within the apartment building did not violate the Constitution, and that the affidavit contains enough information to establish a nexus even without the video evidence.

C. LEGAL STANDARDS

The Fourth Amendment states that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation[.]" U.S. CONST. amend. IV. Probable cause to issue a search warrant exists when there is a "fair probability," given the totality of the circumstances, "that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates,* 462 U.S. 213, 238 (1983); *see also United States v. Rose,* 714 F.3d 362, 366 (6th Cir. 2013). To establish probable cause to justify the search of a place, an affidavit in support of a search warrant "must contain facts sufficient to lead a prudent person to believe that a search would uncover contraband or evidence of criminal activity." *United States v. Danhauer*, 229 F.3d 1002, 1006 (10th Cir. 2000). "A court must look to the 'totality of the circumstances' . . . in order to answer 'the commonsense, practical question' of whether an affidavit is sufficient to support a finding of probable cause." *United States v. May*, 399 F.3d 817, 822 (6th Cir. 2005) (quoting *Gates*, 462 U.S. at 230). At least two criteria must inform this practical, common sense determination: "[f]irst, the affidavit or warrant request 'must state a nexus between the place to be searched and the evidence sought.' . . . [s]econd, '[t]he belief that the items sought will be found at the location to be searched must be supported by less than prima facie proof but more than mere suspicion.'" *United States v. Williams*, 544 F.3d 683, 686 (6th Cir. 2008) (quoting *United States v. Bethal*, 245 F. App'x 460, 464 (6th Cir. 2007)).

It is not enough to establish probable cause to search a property that "the owner of property is suspected of crime." *United States v. McPhearson*, 469 F.3d 518, 524 (6th Cir. 2006) (quoting *Zurcher v. Stanford Daily*, 436 U.S. 547, 556 (1978)). Rather, "[t]he affidavit must contain particularized facts demonstrating a 'fair probability that evidence of a crime will be located on the premises of the proposed search.'" *Id.* (quoting *United States v. Frazier*, 423 F.3d 526, 531 (6th Cir. 2005)). "In other words, the affidavit must suggest 'that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought.'" *Id.* (quoting *Zurcher*, 436 U.S. at 556). "The connection between the residence and the evidence of criminal activity must be specific and concrete, not 'vague' or 'generalized.'" *United States v. Brown*, 828 F.3d 375, 382 (6th Cir. 2016) (quoting *United States v. Carpenter*, 360 F.3d 591, 595 (6th Cir. 2004) (en banc)). An affidavit establishes probable cause only if it establishes "a nexus between the place to be searched and the evidence to be sought." *Carpenter,* 360 F.3d at 594. "[W]hether an affidavit establishes a proper nexus is a fact-intensive question resolved by examining the totality of circumstances presented." *Brown*, 828 F.3d at 382.

The "capacity to claim the protection of the Fourth Amendment depends … upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." *Rakas v. Illinois*, 439 U.S. 128, 143 (1978). A legitimate expectation of privacy requires "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). In determining whether a subjective expectation of privacy is objectively reasonable, courts in the Sixth Circuit consider factors such as: "(1) whether the defendant was legitimately on the premises; (2) his proprietary or possessory interest in the place to be searched or the item to be seized; (3) whether he had the

right to exclude others from the place in question; and (4) whether he had taken normal precautions to maintain his privacy." *United States v. Dillard*, 438 F.3d 675, 682 (6th Cir. 2006).

D. ANALYSIS

1. Common, Unlocked Apartment Hallways

Investigator Behnen's entry into the unlocked apartment building and its common hallways did not violate Mr. Trice's rights under the Fourth Amendment. Even if he had a subjective expectation of privacy, Mr. Trice lacked an objectively reasonable expectation of privacy in the unlocked common hallway. In similar challenges to searches under the Fourth Amendment, the Sixth Circuit has found that there is no reasonable expectation of privacy in unlocked common areas in unlocked apartment buildings. For example, in *Dillard* the court considered whether a defendant had an objectively reasonable expectation of privacy in the common hallway of the duplex in which he resided. The court found that "officers did not violate the Fourth Amendment when they entered Dillard's duplex and walked to the second floor because Dillard did not have a reasonable expectation of privacy in the common hallway and stairway of his duplex that were unlocked and open to the public." *Dillard*, 438 F.3d at 682. In *Dillard*, the door was not only unlocked, but there was no doorbell or intercom system that could alert a tenant of police or other presence. *Id.* The same is true here.

In contrast, in *United States v. Kimber*, the Sixth Circuit found that a defendant did have an objectively reasonable expectation of privacy in the lobby area of a locked residential apartment building. *United States v. Kimber*, 395 F. App'x 237, 248 (6th Cir. 2010). Similarly, in *United States v. Carriger*, the Sixth Circuit found that a tenant in a locked apartment building had a reasonable expectation of privacy in common areas not open to the general public where a government agent entered the building without permission by slipping in while workmen were

leaving. *United States v. Carriger*, 541 F.2d 545, 548, 550 (6th Cir. 1976). Likewise, in *United States v. Heath*, the court ruled that where officers entered a locked apartment building "without utilizing the proper procedure," evidence seized in an ensuing search had to be suppressed, because the evidence "was gained as a result of [the officer's] presence in the common areas of the building." *United States v. Heath*, 259 F.3d 522, 534 (6th Cir. 2001) (quoting *Carriger*, 541 F.2d at 552). The problem for Defendant Trice is that his apartment building had no locked exterior doors, and no other barriers to entry. *Kimber*, *Carriger*, and *Heath* do not apply here. *Dillard* does.

2. The Hidden Camera

But what about Investigator Behnen's placement of the hidden camera in the hallway across from Mr. Trice's doorway? Does that change the calculus? The Court finds that under the governing law, and on the facts presented here, it did not. It was permissible for Investigator Behnen to enter the unlocked, publicly accessible apartment building. Once inside the building, there were no barriers to accessing the common stairs and hallways, and it was permissible for Investigator Behnen to enter those spaces. He could have stood in the hallway all afternoon and waited for an opportunity to observe people coming and going from Apartment B5. In fact, the testimony showed the building laundry facility was on the lower level near Apartment B5, so it would have been possible to develop a plausible cover story. But the more practical – and probably more effective – method was using available technology to place a motion-activated camera on a temporary, short-term basis.

The placement of the hidden camera in the hallway at issue here is functionally similar to use of a pole camera on a public thoroughfare. In *United States v. Houston*, 813 F.3d 282 (6th Cir. 2016), officers used a pole camera to surveil a farm in rural Tennessee. They placed the camera

at the top of a public utility pole and recorded footage over the course of ten weeks. The Sixth Circuit found that the ten-week "use of the pole camera did not violate Houston's reasonable expectations of privacy because the camera recorded the same view of the farm as that enjoyed by passersby on public roads." *Houston*, 813 F.3d at 285. The court emphasized that the agents "only observed what Houston made public to any person traveling on the roads surrounding the farm." *Id.* at 288. The court stated that "the Fourth Amendment does not punish law enforcement for using technology to more efficiently conduct their investigations." *Id.* The same analysis applies here to use of a camera in a publicly accessible hallway. The placement and use of the camera did not violate Mr. Trice's rights under the Fourth Amendment.

The Court also notes that Investigator Behnen was careful to limit the camera surveillance. The camera stayed in place for five or six hours, and it recorded only upon sensing motion. The video clips substantiate Investigator Behnen's testimony that he positioned the camera at an angle meant to capture footage of individuals entering and exiting the apartment. The camera captured no more than what a person passing through the hallway would have seen. "[P]olice may view what the public may reasonably be expected to view." *Houston*, 813 F.3d at 289. The evidentiary record also reflects that Investigator Behnen used the hidden camera to corroborate his reasonable belief that Mr. Trice resided in Apartment B5 based on other information gained during his investigation. That information includes identifying Mr. Trice as a passenger in a car registered to Cradonda Dominique Trice with an address of 114 Espanola Ave., Apartment B5 in Parchment, Michigan; the police report linking Cradonda McFerrin (alias for Cradonda Trice) to the apartment across the hall from Apartment 6; and surveillance during two controlled buys of Mr. Trice exiting and returning to 114 Espanola through the main basement entrance. Investigator Behnen did not use the hidden camera for a fishing expedition. *See United States v. Mohammed*, 501 F. App'x

431, 436-37 (6th Cir. 2012) (contrasting corroboration of independent evidence with improper fishing expedition).

3. Curtilage?

Defendant Trice argues that the part of the hallway area immediately in front of his front door is akin to curtilage and that a heightened expectation of privacy exists in the space. It is certainly true that curtilage is garnering significant new attention in Fourth Amendment analysis. *Florida v. Jardines*, 569 U.S. 1 (2013); *Collins v. Virginia*, 138 S. Ct. 1663 (2018). And in some ways, the front door of a dwelling serves as an important threshold to the private home regardless of whether that is a single-family home in the suburbs, or a low-rent apartment in the city. But under current law, as just reviewed, the common, unlocked hallway in the low-rent apartment building does not carry the same level of protection as the doorstep in suburbia. Defendant cannot cite any case authority establishing that any part of a common, unlocked hallway in an apartment building qualifies as curtilage.

Moreover, even assuming the common hallway amounts to curtilage, there is still no reasonable expectation of privacy in what a person makes visible to anyone viewing the curtilage from a public area. *See Houston*, 813 F.3d at 288 ("[E]ven assuming that the area near the trailer is curtilage, the warrantless videos does not violate Houston's reasonable expectations of privacy, because the ATF agents had a right to access the public utility pole and the camera captured only views that were plainly visible to any member of the public who drove down the roads bordering the farm."); *see also California v. Ciraolo*, 476 U.S. 207 , 213 (1986) (Fourth Amendment does not "preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible."). So once the apartment dweller steps into the

hallway, whatever that person presents is fair game for surveillance without a warrant – just as happened with the pole camera in *Houston*.

4. The Future

This case may present another example of how changes in technology challenge existing Fourth Amendment analytical categories. It is one thing to say that what a person exposes to public view is fair game. But maybe it is something different to say that law enforcement could theoretically follow anyone 24 hours a day so that a warrantless GPS tracking device can constitutionally do the job. The Supreme Court wrestled with that problem in *Carpenter v. United States*, 138 S. Ct. 2206 (2018). It reached a result requiring a warrant but did not agree on the appropriate analytical categories. Similarly here, it is one thing to say that an officer is free to walk into an unlocked common hallway of an apartment building and observe what any of the rest of us could while there. But maybe it would be something else to say that officer could place a hidden camera in front of every door that runs without interruption for 24 hours a day and captures everything happening in the hallway.

Here, the officers did not test the outermost limits of that possibility. They placed a camera for five to six hours, and they captured only motion-triggering activity at the doorway of Apartment B5. They recorded less than five minutes of activity total and never captured any information beyond what anyone standing in the hall by the laundry would have seen. Maybe analytical categories will change to prevent the most extreme logical extensions of the current "reasonable expectation of privacy" regimen. *Cf. Morgan v. Fairfield County, Ohio*, 903 F.3d 553, 567-75 (Thapar, J., concurring in part and dissenting in part). But under current law, based on the actual facts of this case, the Court cannot find a Fourth Amendment violation.

5. Leon Good Faith Exception

The Court finds that Investigator Behnen's entry into 114 Espanola and use of the hidden camera for surveillance did not violate Mr. Trice's rights under the Fourth Amendment. But even if a Fourth Amendment violation occurred, the Court finds that the *Leon* good faith exception to the exclusionary rule applies here. *United States v. Leon*, 468 U.S. 897 (1984). In *Leon*, the Supreme Court "established a new objective inquiry limiting suppression to circumstances in which the benefits of police deterrence outweigh the heaving costs of excluding 'inherently trustworthy tangible evidence' from the jury's consideration." *United States v. White*, 874 F.3d 490, 496 (6th Cir. 2017) (quoting *Leon*, 468 U.S. at 907). The good faith exception provides that even where a search warrant is held to be defective, the evidence is admissible if the searching officers acted in good faith and seized evidence in "objectively reasonable reliance" on the warrant. *Leon,* 468 U.S. at 921–22; *United States v. Czuprynski,* 46 F.3d 560, 563–64 (6th Cir. 1995). "Following *Leon*, courts presented with a motion to suppress claiming a lack of probable cause must ask whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's decision." *White*, 874 F.3d at 496 (internal quotation marks omitted). Here, there is no basis to find that a reasonably well-trained officer would have known of any impropriety in entering the unlocked apartment building and its common hallways, and in making limited use of a camera in the common hallway to corroborate a reasonable belief that Mr. Trice resided in Apartment B5. Investigator Behnen and his fellow searching officers acted in good faith, and their reliance on the search warrant was objectively reasonable. Even if there was a Fourth Amendment violation, *Leon* protects their actions, and the evidence the search yielded must not be suppressed.

E. CONCLUSION

For these reasons, the requested suppression of the evidence is not warranted.

ACCORDINGLY, IT IS ORDERED:

Defendant Trice's Motion to Suppress Evidence (ECF No. 16) is **DENIED**.

Dated: December 10, 2018

/s/ Robert J. Jonker
ROBERT J. JONKER
CHIEF UNITED STATES DISTRICT JUDGE